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The Legality and Morality of Judicial Retirement Ages

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Abstract

The judicial retirement age in the United Kingdom, which requires judges to retire before they reach the age of 70, engages the age discrimination provisions of the Equal Treatment Framework Directive [2000/78/EC] and therefore is only lawful if it is shown to be a 'objectively and reasonably justified by a legitimate aim.' This article argues that the judicial retirement age is justified and therefore lawful under EU law. In support of this argument, I outline a pluralist theory of age discrimination that consists of principles that explain when age-differential treatment wrongs people and when that treatment is justified. The theory includes the following principles: equality of opportunity; social equality; autonomy; respect; and efficiency. After considering these principles, I argue that the judicial retirement age in the United Kingdom is justified by advancing equality of opportunity and social equality by increasing the turnover of judges and therefore increasing the number of vacancies for younger people and underrepresented groups.

Key words:

Age discrimination, EU law, judicial retirement ages, Framework Directive, pluralism.

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Introduction

Mandatory retirement ages were once a widespread and accepted tool for workforce planning in the United Kingdom. Increasingly, however, they have been challenged on the grounds that they are discriminatory. With the repeal of the national default retirement age, employers can now only lawfully implement a retirement age if the retirement age can be objectively justified as a proportionate means of achieving a legitimate aim.¹ As a result, large numbers of employers have abandoned mandatory retirement ages and have sought other ways of planning the departure of staff.

However, there are a few industries that continue to use mandatory retirement ages, most notably the judiciary. Section 26 of the Judicial Pensions and Retirement Act 1993 requires that judges retire before they reach the age of 70 unless a Minister grants permission for particular judges to retire after this age. This retirement age is exempted from the Equality Act 2010 prohibition of age distinctions as a result of section 191 and schedule 22 of the Equality Act 2010, which provide that age distinctions are lawful when an employer must implement an age distinction due 'to the requirement of an enactment.'²

In a recent article, Alysia Blackham (2017a) has argued that the judicial retirement age in the United Kingdom is nonetheless likely to violate EU law. This is because the judicial retirement age engages Article 3(1) of the Equal Treatment Framework Directive [2000/78/EC] ('the Framework Directive') which prohibits unequal treatment because of age in the context of 'employment and working conditions' unless the treatment is 'objectively and reasonably justified by a legitimate aim...and if the means of achieving that aim are appropriate and necessary.' Blackman's view is that the government will struggle to demonstrate that the judicial retirement age is objectively and reasonably justified, and therefore the retirement age may violate the Framework Directive.³

In this article, I argue that the judicial retirement age is compliant with the Framework Directive and lawful because the judicial retirement age can be objectively and reasonably justified. After setting out a number of arguments from the case law, Hansard debates and academic commentary on retirement ages, I consider a theory of age discrimination that consists of a range of principles that can determine when age-differential treatment is justified and when it is not, and I apply this theory to judicial retirement ages. The theory of age discrimination consists of the following principles: efficiency; equality of opportunity; social equality; autonomy and respect.⁴ After considering these principles, I argue that the judicial retirement age is a proportionate means of advancing equality of opportunity and social equality by the policy creating opportunities for younger workers which can in turn advance the aim of increasing the diversity of the judiciary. However, I explain that we should reject the unpersuasive argument propounded in UK and EU cases that retirement ages are justified on the basis that they are an efficient proxy for declining performance.

Determining the Legality of the Judicial Retirement Age Requires a Theory of Age Discrimination

A theory of age discrimination is essential in identifying unlawful age discrimination under the Framework Directive and the Equality Act 2010 because the Framework Directive and the Equality Act 2010, which are both effective in the UK, distinguish justified from unjustified age-differential treatment with only the former being lawful. Article 6 of the Framework Directive, for example, asserts that '[m]ember States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim...and if the means of achieving that aim are appropriate and necessary.' Section 13(2) of the Equality Act 2010 (which implements article 6 of the Framework Directive) provides that age-differential treatment does not constitute unlawful age discrimination if the treatment is a 'proportionate means of achieving a legitimate aim.'

Determining whether the judicial retirement age (which engages the Framework Directive⁵) is objectively and reasonably justified requires that we apply the proportionality test as adopted in UK and EU case law, which requires that we determine whether the judicial retirement age is suitable to achieving a legitimate aim, necessary to achieve that aim and that it does not impose burdens or cause harms to other legitimate interests that outweigh the objectives achieved.⁶ This proportionality test requires a moral theory of age discrimination because the process of identifying 'legitimate' aims that justify age-differential treatment requires that we identify the objectives that are important enough to justify treating people unequally on the grounds of age, and the final stage of the proportionality test requires weighing and choosing between competing moral considerations about the importance of the value pursued by the impugned measure and the discriminatory harms of that measure (see Möller, 2012). It follows that determining whether the judicial retirement age is objectively justified and therefore lawful under the Framework Directive, we must engage with theoretical questions about the principles that determine when it is unjustified to treat people less favourably on the grounds of age. This article outlines a theory of age discrimination to support this process.

An Overview of the Arguments on Judicial Retirement Ages from the Hansard debates, Case Law and Academic Literature

The need for a theory of age discrimination also arises because the debate on the judicial retirement age in the United Kingdom (from the case law, Hansard debates and academic literature) lacks an open assessment into the competing interests and principles at stake.

The Parliamentary debates on Judicial Pensions and Retirement Bill reveals support for the judicial retirement age of 70 on the grounds that the policy maintains public confidence in the judiciary by responding to the public perception that the judiciary is too old and therefore 'out of touch' (HC Deb 3rd December 1993 vol. 215, col. 435). The assumption is that a retirement age of 70 removes older judges that the public may consider to be past their best. Further to this, it was said that the UK 'need[s] the attitudes and abilities of a younger, more in-touch judiciary' and that '[n]ew blood prevents the judiciary from becoming stale and out of touch' (HC Deb 3rd December 1993 vol. 215, col. 458).

The statements reflect stereotypes about the capability of older judges but it is not explained why age generalisations are justified in this context when we would consider race or sex stereotyping unacceptable as a reason to remove a person from their work. As Mr Nicholls stated in the Parliamentary debates, there is a ‘duty not merely to accept what the public feel but to try to inform them as well’ and that there is no reason or logic ‘in saying that, simply because someone is born before a particular date, he is incapable of carrying out his functions’ (HC Deb 3rd December 1993 vol. 215, col. 455). We need to examine age stereotyping and the reason for the acceptability or otherwise of generalisations about age in the context of the judicial retirement age.

The ET in *White v Ministry of Justice* [2014] ET/2201298/2013 held that the compulsory retirement of a circuit judge at 70 years of age was objectively justified and therefore compliant with the Framework Directive. The judicial retirement age, the ET held, is a proportionate means of achieving the following legitimate aims: (1) promoting inter-generational fairness by creating opportunities for younger people; (2) preserving judges’ dignity by avoiding capability assessments for older judges; and (3) maintaining public confidence by ensuring that the public do not form the belief that judges are undergoing age-based intellectual decline.

In finding these aims legitimate, the ET applied the leading UK authority in age discrimination law – *Seldon v Clarkson, Wright and Jakes* [2012] UKSC 16, which held that measures disadvantaging older people are capable of being justified by furthering the aim of promoting employment for younger people and that a mandatory retirement can be justified by avoiding the humiliation of capability assessments for older workers.

It was not explained by the ET in *White* or the reasoning by the Supreme Court in *Seldon* why it is justified to force older people out of work to provide opportunities for younger people. These judgments also failed to offer analysis for why it is justified to dismiss older workers to avoid capability assessments. A theory of age discrimination can help to examine whether these aims are capable of justifying judicial retirement ages.

The lack of theorising on age discrimination is also present in EU cases. For example, the CJEU in *Commission v Hungary* C-286/12 [2013] 1 CMLR 44 held that Hungary’s policy to compulsory retire judges, prosecutors and notaries at the age of 62 was unjustified age discrimination under Art 2 and 6 of the Framework Directive because the ‘provisions at issue abruptly and significantly lowered the age limit for compulsory retirement, without introducing transitional measures of such a kind as to protect the legitimate expectations of the persons concerned’ [68]. Nonetheless, the CJEU held that the policy did support legitimate aims, namely, ‘establishing a more balanced age structure facilitating access for young lawyers to the professions of judge, prosecutor and notary’ and ‘to prevent possible disputes concerning employees’ fitness to work beyond a certain age’ [62]. In finding this, the CJEU applied well-established authority (see *Fuchs* [2011] 3 CMLR 47 at [50]) on the types of aims capable of justifying compulsory retirement ages. However, the CJEU offered no explanation for why it is justified to favour young lawyers to enter the profession at the expense of older judges and no explanation for why it is justified to dismiss workers on the basis that older judges may require capability assessments.

To find some deeper theorising on age discrimination that can be relevant to understanding the morality and legality of judicial retirement ages, we can examine the reasoning in the wider case law on retirement ages. Lady Hale in *Seldon* held that social policy (including the aim of protecting older people from incapacity assessment and using a retirement age to create more opportunities for younger people) can justify retirement ages even though such aims are incapable of justifying distinctions on other protected grounds, such as race or sex, because 'age is different... not "binary" in nature (man or woman, black or white, gay or straight) but a continuum which changes over time... younger people will eventually benefit from a provision which favours older employees, such as an incremental pay scale; but older employees will already have benefitted from a provision which favours younger people, such as a mandatory retirement age' [4].

Similarly in *R (The Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform* C-388/07 [2009] ECR I-1569, which concerned the UK's mandatory retirement age, Advocate General Mazák of the CJEU asserted that '[a]ge is not by its nature a "suspect ground", at least not so much as for example race or sex' because age is a "'fluid" characteristic that changes over time, and age distinctions are widespread in law' [74]. This explains, he argued, why the Framework Directive permits EU member states to pass laws that treat people differently on the grounds of age, such as mandatory retirement ages.

The approach in *Seldon* and *Age Concern England* recognises that age distinctions, such as retirement ages, can be compatible with equality of opportunity because as people age they will experience the benefit and detriment of being young and the benefits and detriments of being older and that this means age distinctions are not as offensive to people's dignity as other forms of differential treatment. The problem with this reasoning, however, is that age distinctions, such as retirement ages, do not necessarily contribute to equality of opportunity because age distinctions are unlikely to affect people in the same way. For example, it is unlikely that every worker in a workplace with a retirement age will experience that retirement age in the same way. Some may leave the employer before reaching the retirement age and may choose to work for an employer that does not have a retirement age. The retirement age may also be changed or removed at particular times. A theory of age discrimination can examine to what extent, if at all, we can justify age-differential treatment by equality of opportunity as suggested in *Seldon* and *Age Concern England*.

There is relatively small amount of academic literature on the judicial retirement age in the UK but Alysia Blackham (2017a) has offered extensive commentary. Blackham has outlined a range of possible aims to justify the policy, including the retirement age being used to dismiss older judges in order to respond to public perception that older judges may lack capacity, the aim of the retirement age avoiding the need to subject older judges to capability assessments and the aim that the retirement age can facilitate new and more diverse judicial appointments. The UK courts, Blackham argues, are unlikely to accept the aim of securing public confidence in the judiciary since this aim is based on ageist assumptions about the capability of older people. However, in line with the findings by the

Supreme Court in *Seldon*, using the judicial retirement age to avoid subjecting older judges to the indignity of capability assessments and using retirement ages to create more judicial appointments will be legitimate aims.

Blackham argues that the judicial retirement age may nonetheless be unjustified and therefore unlawful under the Framework Directive. The reason is that, in Blackham's view, the harms of the judicial retirement age outweigh the alleged benefits. This is because the judicial retirement age can have the effect of ending some judges careers in the legal profession in the UK due to the Guide to Judicial Conduct and the judicial terms of appointment providing that judges in England and Wales should not offer legal advice or work as an advocate after retirement. Further, only approximately two-thirds of judges choose to retire before their 69th birthday and the vast majority of judges retiring before the retirement age of 70.⁷ This means, Blackham argues, that the judicial retirement must only have a modest impact on the aim of creating new vacancies and only a modest impact on the aim of preventing older judges from undergoing capability assessments. Blackham argues that this possible modest gain does not justify the harm of the policy potentially ending the careers of older judges.

A Theory of Age Discrimination

I have established above that a theory of age discrimination is essential to determining the legality of the judicial retirement age in the United Kingdom but a detailed discussion of such a theory has been largely absent from the discussions on the judicial retirement age. Further to offering a theory of age discrimination that can distinguish justified from unjustified age-differential treatment and therefore determine the legality of the judicial retirement age, we must consider the features of age and ageing and the significance this has in people's lives. Age is significant as both a biological and a social phenomenon. People of different ages have different physical features and functioning that is caused by the development and ageing process (Bond, 1993). Developments include major physical and mental changes, including changes in body shape, growth in height and weight, development of coordination and balance. Ageing concerns features that make people more susceptible to the things that will lead to death. It is a universal process experienced by everyone except those who die young.

Age is also a major component of the social structure linked to the assignment of status, social roles and responsibilities (Eisenstadt, 1956). For example, age classification determines when we are 'supposed to enter school, leave school, marry, drink, vote, smoke, get called up for military duty in a real column, draw a retirement pension, and a great deal else in between the registered birth and the registered death' (Young, 1989: 109).

In constructing a theory of age discrimination, we must consider principles that capture these features of age and ageing. An important starting point that can be drawn out from the above is that age can be a proxy for certain attributes and abilities, whether

biologically or socially constructed. For example, the age-based structuring of society means that age is used as a proxy for a wide range of characteristics, including 'intellectual and emotional maturity (e.g. minimum ages for entering school), readiness to assume adult responsibilities (e.g. minimum ages for voting, drinking, driving and marriage), physical strength or speed of response (e.g. maximum ages for policemen, bus drivers, or air-line pilots), economic productivity (e.g. age of retirement), and various types of debility (e.g. ages for eligibility for medical services and social services)' (Neugarten, 1996: 822).

Using age as a proxy in this way can be efficient by maximising a particular social good. Efficient in this context means achieving a particular goal with a minimum amount of waste, effort or costs. The efficiency value of using age as a proxy is present when using age is less costly than directly measuring the thing age is a proxy for. For example, the National Institute for Care and Health Excellence (2013) recommend that there should be restricted access to in vitro fertilisation for women over 43 for the reason that it is unlikely to be successful for these women. Age here is used as an efficient-proxy for the possibility of the procedure resulting in pregnancy. It is efficient because it is less costly to assume women over 43 years of age are unlikely to benefit from in vitro fertilisation than it is to assess each woman's likelihood of benefitting from the treatment.

Another example is criminal responsibility. England and Wales has a criminal age of responsibility set at 10 years of age because children below this age are unlikely to have the capacity to understand what they had done wrong and why.⁸ While some children under 10 years of age have the mental capabilities to be responsible for crimes, a large proportion do not. Using age as a proxy here is efficient because age is a more objective and measurable target than the thing age is a proxy for. For example, without an age proxy for criminal responsibility, we would have to assess the mental capacities of each child under 10 suspected of a crime. It is more efficient to assume that all children under 10 have no criminal responsibility since we know that most children at this age lack this trait. This use of an age proxy promotes criminal justice.

Age distinctions are also useful in other ways. Society has become age-regimented with different roles assigned to different age groups. We expect children to be in education, adults in work and older people retired. This age-based structure ensures that we organise the chronological order of people's life activities to ensure they gain skills before having them put to practice (see Gosseries, 2014). For example, we force children to start learning early in their lives because it is efficient that they learn skills necessary for work life before engaging in employment.

It is important to consider why efficiency can justify age-differential treatment. Efficiency is not an intrinsic good. It can only justify a course of action if the aim is to maximise an end that is valuable. Efficient slavery, for example, is not justified, but the efficient use of healthcare resources is a good thing that we ought to aim for. We can understand this demand from efficiency as a demand to maximise welfare. For example, using age proxies in healthcare (such as restricting access to in vitro fertilisation to women

under 43 years of age) has the consequence of efficiently distributing resources which in turn can maximise welfare in society.

The efficiency of using age proxies and sequencing people's lives by age explains why we consider many age-based social structures justified, including age distinctions limiting the ability of young people to work in the labour market, restricting driving to people over 17, having an age of consent at 16, film classifications by age and alcohol restrictions by age. All of these examples use age to promote valuable social ends. A theory of age discrimination should therefore incorporate an efficiency principle.

However, the fact that something can be a reliable proxy does not necessarily justify its use as a proxy. Sometimes efficient age proxies can treat people unjustly. For example, an employer may justify not hiring women because women are more likely to need time out of the labour market. Even if this policy is efficient as a way to reduce costs to the business, it is still unjustified because it violates a number of principles, including undermining equality between men and women. We must, therefore, also consider other principles that are relevant to evaluating the justifiability of age distinctions.

Equality of opportunity, for example, is an important principle to consider in relation to age discrimination. Equality of opportunity holds that it is wrong for someone to be worse off when they are not directly responsible for their condition of being worse off (see Mason, 2006). The sorts of things we are not responsible for include the circumstances a person finds themselves in, including our genetics, our ethnicity and our upbringing. There are a number of different conceptions of equality of opportunity, but the major accounts are equality of opportunity to resources (endorsed by Dworkin, 1981) and equality of opportunity to welfare (endorsed by Arneson, 1989).

Equality of opportunity seems to account for many of our intuitions about discrimination because a major reason why we find discrimination wrong is we recognise that it is unfair to impose a disadvantage on the grounds of a characteristic that the individual is powerless to change. Many of the protected characteristics in the Equality Act 2010, such as race, sex and nationality, are traits that people are powerless to change. Age is also factor outside our control since at any one time we are a particular age, but, as highlighted by Lady Hale in *Seldon*, age is changeable since we each take turns experiencing different age groups and this has implications for understanding the morality of age discrimination. It means that people may experience the different advantages and disadvantages associated with different age groups and that age-differential treatment can be compatible with equality of opportunity measured *over a complete life*.⁹ The nature of age means we can use age distinctions to compensate detriments at one time of life with gains at another time of life, and this can work to justify those age-based distinctions, for example, in job recruitment and terms of employment, which are based on stable policies that apply uniformly to all people. This means that if we measure distributive equality *over a complete life* – from birth to death – then we can justify age-differential treatment if it is likely to secure equal resources or welfare distributed over a complete life.¹⁰ A theory of age discrimination, therefore, should incorporate the principle of equality of opportunity.

However, it is clear that age-differential treatment can still be wrong even if it is consistent with equality of opportunity. Consider a policy that creates severe disparity in resources and welfare between the young and the old but maintains equal resources and welfare measured over a complete life. This may redistribute wealth to the young leaving older people in poverty. The fact that each individual may experience the same levels of poverty over their complete lives does not make the policy justified.¹¹ We must therefore invoke other principles to explain why this type of age discrimination wrongs people. To explain why and when age discrimination is wrong, we must identify the principles that explain why and when it is morally wrong to treat people less favourably on the grounds of age even if this means all people have equal opportunities over a complete life.

Social equality can explain why this unequal treatment is wrong. This principle holds that discrimination is wrong when it creates conditions where people are unable to interact as equals.¹² Social equality, unlike equality of opportunity, does not directly concern any specific distribution but instead concerns a particular ideal that people should be able to regard one another as equals.¹³ Any form of social hierarchies that convey a ranking of human beings is wrongful inequality on this account. Under the social equality account, the problem with a policy that creates a severe disparity of welfare and resources between different age groups is that it creates conditions in which the fortunate groups can dominate, oppress or exploit others.

Social equality, however, can justify some forms of age-differential treatment. For example, positive action in favour of disadvantaged age groups can be a means to achieve social equality, rather than a breach of the principle. Positive action, such as offering work training to young people or initiatives to help older people back into employment, can facilitate the participation of marginalised age groups.

Social equality as an explanation of discrimination, however, is limited by its presupposing that the wrongfulness of discrimination is located in its *effects* on social groups. Certainly, discrimination can have bad effects, but the wrongness of direct forms of discrimination seems to concern, at least partly, what *brings about the effects*.¹⁴ For example, it is usually explained that laws that limit marriage to opposite-sex couples is wrong because in refusing gay people the right to recognise their relationships as 'marriages,' it sends the *message* that same-sex couples are inferior to heterosexual couples.¹⁵ Therefore, in locating the wrong of discrimination, we also need to look not just at its effects but also at the message conveyed by the discriminator.

The respect account of discrimination attempts to do this by finding that discrimination is wrong when it conveys disrespectful messages.¹⁶ This account relates to the Kantian principle that certain acts are intrinsically wrong because those acts pursue impermissible ends. This idea is that human beings have an intrinsic worth or dignity which requires that we treat people in a respectful way as ends and not mere means. The impermissible ends can include judgments of prejudice and hostility that convey the message that a person has lower social worth and usefulness, including acts of racism, sexism and ageism. Determining whether age-differential treatment is disrespectful and

therefore wrong requires that we determine whether it is motivated by prejudice, stereotyping and/or conveys a message that certain age groups have a diminished moral or social worth.

Some have argued that the respect principle does not explain age discrimination because age discrimination has not been a practice marked by prejudice, dislike and hostility. For example, Samuel Issacharoff and Erica Worth Harris (1997) have argued that age discrimination laws in the US, which protect older people from discrimination, do not protect any group that is socially reviled, penurious, or cut off from the mainstream of society. Similarly, Lord Walker in *R (Carson and Reynolds) v Secretary of State for Work and Pensions* [2005] UKHL 37 [60] argued that age distinctions are different from other forms of discrimination because classifying people by age is not 'intrinsically demeaning' in the way that race or sex classifications are.

However, both young and old have been subject to demeaning ideas about their worth as people. For example, age discrimination can demean older people by conveying that they are burdensome to society by taking up too many resources. The young, in contrast, are often stereotyped as immature, unruly and violent. As Grimley Evans (2003: 20) has highlighted, '[a]geist prejudice is deeply and widely pervasive in British society,' and '[i]t is treated as in some way "natural," even by many older people.' It is important, then, that a theory of age discrimination incorporates a respect principle.

Autonomy can also explain why and when age-differential treatment wrongs people. Gardner (1998: 170) defines autonomy as 'the ideal of a life substantially lived through the successive valuable choices of the person who lives it, where valuable choices are choices from among an adequate range of valuable options.' Discrimination violates autonomy by attaching costs to a trait that people's choices can make no difference to. For example, in the health sphere, a doctor deciding that older patients do not have priority for certain drugs can lead to older people missing out on treatment that can help them retain their independence at a time of life when older people face health challenges to their autonomy. Barriers to older workers training for certain professions, such as medicine, prevent older workers from having control over their lives. Laws restricting voting rights, driving and drinking alcohol significantly undermine young people's autonomy. Like social equality, however, the principle of autonomy can work to justify some forms of age distinctions which work as positive action in favour of age groups that typically suffer from lower levels of autonomy.

A theory of age discrimination, then, should include each of the principles outlined above, including considerations of efficiency, equality of opportunity, social equality, autonomy and respect. This pluralist approach to age discrimination draws together a range of principles that have plausible explanations of the wrong of discrimination.¹⁷ It creates the opportunity to determine the legality of treatment that engages the age discrimination provisions of the Framework Directive.

This theory of age discrimination may also be applicable to other grounds of discrimination in EU law, including race, sex and disability, to determine why and when that treatment is wrong. The academic literature has identified a range of principles explaining the general wrong of discrimination but prominent answers have included the principles of the theory of age discrimination outlined in this article, including equality of opportunity (Segall, 2012), social equality (Bagenstos, 2013), autonomy (Gardner, 1998) and respect (Hellman, 2004).

To determine whether an age distinction is justified, we should consider the extent to which the age distinction violates or promotes these principles. In the next section, I explain how this pluralist theory of age discrimination can assist in determining the legality of the judicial retirement age.

How the Pluralist Theory of Age Discrimination Can Determine the Legality and Morality of Judicial Retirement Ages

We can divide the process of assessing the legality of judicial retirement ages into four stages. The first stage is to determine whether the judicial retirement age engages the direct or indirect age discrimination provisions of the Framework Directive. If the treatment does engage these provisions, then we must undertake the proportionality test of Article 6 of the Framework Directive, which requires an assessment of whether the judicial retirement age is ‘objectively and reasonably justified by a legitimate aim...and if the means of achieving that aim are appropriate and necessary’. In the second stage of assessing whether the retirement age is lawful, and further to undertaking the proportionality test, we must assess whether the treatment is *suitable* for achieving a legitimate aim. This means that the retirement age must be rationally connected to a legitimate aim. If it is not suitable to achieving a legitimate aim, then the treatment is disproportionate and unlawful. If the treatment is suitable to a legitimate aim, then we move to the third stage to assess whether the treatment is *necessary* to achieve that aim. A measure will only be necessary if there are no clear alternative forms of treatment that can achieve the legitimate aim without the equivalent discriminatory impact. If the treatment is unnecessary, it is disproportionate and therefore unlawful age discrimination. If it is necessary, then we move to the fourth stage, which requires an assessment of whether the judicial retirement age causes harms that outweigh the objectives achieved. If the treatment passes each of these stages, it is proportionate and therefore lawful.

Each of the principles of the pluralist theory of age discrimination outlined in this article can assist in this process. For example, the principles can establish when impugned treatment engages the direct and indirect discrimination provisions by identifying when an individual is treated less favourably on the grounds of age and identifying when age-neutral treatment disadvantages particular age groups. In most cases, this assistance will be unnecessary because the ordinary process of identifying direct or indirect discrimination usually only requires a common-sense assessment of whether a person has suffered a

disadvantage. For example, it is common sense that denying a person a job because of age is treatment that engages the direct discrimination provisions. However, the theory can be useful in harder cases. For example, the theory can determine when age-based comments engage the direct discrimination provisions. Offensive, insulting remarks relating to age or comments that reflect prejudice or age stereotyping violates the respect principle and therefore engage the direct discrimination provisions.¹⁶

The pluralist theory of age discrimination is particularly helpful at the second stage which requires that we identify the sort of aims that can justify age-differential treatment. Age-differential treatment, I have explained, can be used as an efficient proxy, but it can also assist in securing greater equality of opportunity in society, promote social inclusion and the autonomy of disadvantaged groups. It is essential, then, to consider these principles not only in determining when a person has a right not to be treated differently on the grounds of age but also to determine when impugned age-differential treatment is justified under the proportionality test. According to the pluralist theory of age discrimination, legitimate aims capable of justifying age-differential treatment should include aims that enhance efficiency, equality of opportunity, social equality and/or autonomy.

The respect principle also identifies illegitimate aims as aims that reflect age stereotyping or prejudice, or any attitude that particular age groups have a diminished social or moral worth are illegitimate. According to the respect principle, no one should suffer from communications that they have an inferior status because of their age. This means that it is essential that judges hold that public-policy goals or private interests do not justify acting on derogatory beliefs.

The pluralist theory of age discrimination can also assist in the final stage which requires assessing whether the judicial retirement age causes harms that outweigh the objectives achieved. I have established that age-differential treatment can violate equality of opportunity, social equality, autonomy and respect but age-differential treatment can also sometimes respect equality of opportunity, social equality, autonomy, respect and efficiency. According to the pluralist theory of age discrimination, a judicial retirement age is only justified and lawful if there is an appropriate balance between promoting and/or violating these principles. To determine whether the retirement age is objectively justified, we must therefore calculate the extent the retirement age violates one or more of the principles of the pluralist theory of age discrimination and calculate the extent the measure advances any of these principles.¹⁸

Applying the Pluralist Theory of Age Discrimination to Judicial Retirement Ages

The first stage of applying the theory is straightforward. Judicial retirement ages can force people to retire at the age of 70 and therefore the judicial retirement age treats older people

less favourably than other age groups. This means the judicial retirement age engages the direct age discrimination provisions of the Framework Directive.

Moving on to the second stage, we must identify whether the retirement age promotes a legitimate aim by advancing one or more of the principles of the pluralist theory of age discrimination, including equality of opportunity, social equality, autonomy and/or efficiency. Aims are illegitimate if they reflect age stereotyping, prejudice and/or demeaning ideas about particular age groups.

To identify possible legitimate aims, we can return to the aims identified in the UK and EU cases discussed above. For example, in *White*, the ET held that the judicial retirement age was justified and lawful. The ET accepted the following as legitimate aims: (1) avoiding capability assessments for older judges, thereby preserving judges' dignity; (2) maintaining public confidence in the judiciary by ensuring that judges are not perceived as undergoing age-based intellectual decline; and (3) creating employment opportunities for younger people. The leading case on age discrimination law, *Seldon*, held that these social-policy objectives are capable of justifying retirement ages. In turn, the CJEU held in *Rosenbladt* that EU member states can use these aims to justify retirement ages.

The first aim reflects the efficiency principle of the pluralist theory of age discrimination. This holds that age can be used as a proxy when it is less costly and more objectively measurable than measuring the thing that age is a proxy for. The first aim identified in *White*—assumes that age is a proxy for declining performance and that a retirement age can be an efficient way of dismissing incompetent judges while avoiding the costs associated with dismissing judges after a capability assessment. The legitimacy of this aim, however, depends on whether age is in fact an accurate proxy for declining performance. There is, however, no compelling empirical evidence to support the general claim that job performance declines with age (see McEvoy and Cascio, 1989; Ng and Feldman, 2008). Age is an unreliable proxy for performance and therefore we should avoid targeting older people for dismissal on the grounds that their capability is declining due to ageing.

Further, the first two aims identified above—(using the judicial retirement age to avoid capability assessments and to maintain public confidence in the judiciary); reflect negative stereotypes about the capabilities of older people and therefore violate the respect principle of the pluralist theory of age discrimination. The aims assume that older judges need to be removed from employment because they may not be capable of doing their jobs effectively. This negative generalisation is likely to be inaccurate for a large number of judges since people can age differently with many retaining high intellectual ability till late in life. Ageing may include declines in certain capabilities, but it can also offer the benefits of experience. Further, even if we were to assume older people have declining capability at a general level, it still wrongs people and is empirically unsound to make assumptions about capability without assessing individuals' actual capabilities. The aims should not, therefore, be capable of justifying judicial retirement ages.

Lady Hale in *Seldon* expressed sympathy for the view that the first aim is ‘suspiciously like stereotyping’ because it used age as a proxy for poor performance. However, the Supreme Court held that they were bound by the EU case law, such as *Rosenbladt v Oellerking Gebäudereinigungsgesellschaft mbH* C-45/09 [2011] 1 CMLR 32 which held that avoiding ‘unseemly debates about capacity’ is a legitimate aim. This means that the UK courts and the CJEU have set a precedent that this to be a legitimate aim. However, the European Union (Withdrawal) Bill proposes that CJEU decisions decided before the UK leaves the EU will have the status of Supreme Court decisions after the UK exits the EU. It is possible for the UK Supreme Court to take this as an opportunity to overrule judgments of the CJEU should it consider that justice requires departure from that precedent. It is possible (and recommended by this article) that the UK courts, after the UK withdraws from the EU, should hold the aim of using retirement ages to avoid capability assessments as an illegitimate aim.

The judicial retirement age may less effective at achieving these aims than treatment that does not treat people unequally on the grounds of age. It is plausible, for example, that capability assessments can be effective in maintaining public confidence in the capabilities of the judiciary and that these assessments can be designed to avoid humiliating a judge. For example, the judiciary can introduce an appraisal system that judges must undertake at regular intervals (see Blackham, 2017a). This avoids targeting judges at particular ages and avoids implying older judges are incompetent. This can render the aim of using a judicial retirement age to maintain public confidence in the judiciary unnecessary.

In contrast, the third aim – to use a judicial retirement age to open vacancies that can be filled by younger workers – is rightly considered by the case law to be a legitimate aim. This rationale for retirement ages concerns the promotion of inter-generational fairness which can promote the principles of social equality and equality of opportunity of the pluralist theory of age discrimination. Unlike the aims of avoiding capability assessments and maintaining public confidence in the judiciary, inter-generational fairness does not violate the respect principle by stereotyping people. Instead, inter-generational fairness aims to distribute opportunities to particular age groups by balancing the legitimate interests of different age groups. For example, a judicial retirement age can promote equality of opportunity by requiring access to income and work to be withheld from those who have held an office for a considerable time (older judges) and given to age groups who have not (younger people).

By distributing jobs and promotion opportunities from older workers to younger groups, a retirement age gives younger people a chance to gain experience and develop their careers, and in doing so, it can aim for a fair share of work opportunities across generations. This argument assumes that older workers have had a ‘fair innings’ in their careers and younger people have not yet had a fair innings.

Further, the judicial retirement age can support social equality by creating vacancies to groups that are underrepresented in the judiciary, including women. Women have been disproportionately excluded from the judiciary. In 2017, only 28% of judges were women and there are currently only two women Supreme Court Justices.²⁰ The

judicial retirement age can help increase the level of social and political influence of women by increasing the number vacancies in the judiciary that women may apply for.

But it must be established whether the retirement age can successfully open vacancies for younger people and increase the representation of women in the judiciary. Sandra Fredman (2003) has argued that retirement ages do not necessarily create vacancies because retirement ages do not necessarily create more jobs and opportunities at the macro level. This is because there are not a finite number of jobs where opportunities arise simply because people are forced from their jobs.

However, Fredman also rightly notes that while jobs are not finite at a macro level, individual workforces do offer a relatively fixed number of jobs. The nature of the judicial office ensures that the judiciary is a relatively inflexible workforce. There are not the methods to remove judges that are available in the private sector workforces. A retirement age offers a degree of flexibility to open vacancies to younger people who may otherwise not have the opportunity. There is evidence that the judicial retirement age has contributed to increasing the number of women judges – there are a higher proportion of women replacing retired judges than were previously in judicial office (see Blackham, 2017b).

Blackham (2017a) argues that, despite the fact that the judicial retirement age can contribute to a more diverse judiciary, the judicial retirement age is unfair because the retirement age will not affect people equally – many judges will voluntarily leave the judiciary before reaching the retirement age and may choose to work for an employer that does not have a retirement age. The policy may also be changed, for example, with the retirement age increasing. This will mean that some will receive greater detriment from the policy than others. The retirement age, therefore, is unlikely to secure complete equality of opportunity.

Nonetheless, the retirement age can still create conditions that are more equal than they would be without a retirement age and therefore can increase fairness overall. It can do this by opening opportunities for groups who may not have promotion opportunities if the older judges did not retire. While a judicial retirement age will not solve the problem of the lack of diversity in the judiciary, it may have the effect of speeding up the process, and since there is a pressing need to achieve greater diversity, this aim should be capable of justifying the policy. Relying on the diversity problem sorting itself out over time as older judges retire voluntarily may mean very slow progress.

Moving on to the third stage of applying the pluralist theory of age discrimination, it is appropriate to conclude that the judicial retirement age of 70 is reasonably necessary to achieve the legitimate aim of creating opportunities for younger people. A retirement age set at 70 is more likely to achieve the aim than a retirement age set at an older age or a policy of not having a retirement age. This is because a judicial retirement age will prompt a higher turnover of judges leading to a greater possibility of opening job opportunities for younger people and underrepresented groups.

The fourth stage of assessing the legality of the judicial retirement age requires determining whether the retirement age promotes the principles of the pluralist theory of age discrimination, including social equality and equality of opportunity, to the extent that justifies the seriousness of the interference with the older judges' interest in being free from the detriment of the retirement age.

The pluralist theory of age discrimination recognises that while retirement ages can promote equality of opportunity and social equality by granting work opportunities to younger people and underrepresented groups, this compromises social equality from the perspective of older workers since it hinders their capacity to participate in society through productive work. It follows that retired judges are incapable of participating in society as equals with their younger peers. The retirement age also harms the autonomy principle by forcing judges out of socially productive work and therefore preventing them from having control over their work lives. Further, as Blackham (2017a) notes, the judicial retirement age can come at the cost of losing the expertise of the older experienced judges. To determine whether the judicial retirement age is proportionate, we must establish whether the policy achieves a fair balance between the interests of older workers and younger people.

As outlined above, Blackham (2017a) identifies two reasons for holding that the judicial retirement age is disproportionate. Firstly, the judicial retirement age can have a severe effect on judges' lives by ending judges' professional legal careers. This is because the Guide to Judicial Conduct and the judicial terms of appointment hold that judges in England and Wales should not offer legal advice or work as an advocate after retirement. Secondly, about two-thirds of judges choose to retire before their 69th birthday and the vast majority of judges retire before the retirement age of 70 meaning that the judicial retirement must only have a modest impact on improving the diversity of the judiciary and increasing opportunities for younger people.

However, there are cogent reasons for concluding that the judicial retirement age of 70 achieves a proper balance between the interests of older judges and younger people and is therefore objectively justified under the Framework Directive. As Kavanagh (2010: 226) has argued, 'the severity of the rights violation' is a relevant consideration in determining the appropriate deference to the original decision-maker in forming the impugned policy. The more serious the detriment the policy has on a particular group of people, the greater the gain in a public interest there must be for the policy to be proportionate.¹⁸ The more modest the detrimental impact of the policy, the more modest the gain in public interest is needed to justify the policy. As established above, the judicial retirement age only has a limited adverse impact on the judiciary with the vast majority of judges retiring before the judicial retirement age, which means that only a modest gain in the public interest should be sufficient to justify the policy. While the retirement age can have a detrimental impact on individual judges, for example, if a judge failed to build up a sufficient pension before the age of 70, the policy can be justified by its positive effects it has on the judiciary as a whole in increasing turn-over and diversity and the fact that there is only a detrimental impact for a small number of judges. In other words, the benefits of the judicial retirement age on the judiciary as a whole outweigh its detrimental impact on a small number of particular judges. Since there is evidence that the judicial retirement age is addressing the pressing social need to improve the diversity of the judiciary, this is a good reason to find the retirement age justified.

This argument is strengthened when we consider that the government settled on a retirement age of 70 after consultations between the Lord Chancellor and senior members of the judiciary. The retirement age, then, had backing from the democratically accountable government and from at least some members of the judiciary. It is appropriate to accord

weight to the fact that the government and the judiciary had worked together to strike a balance between the interests of older judges and others. We should accord weight to the democratic decision in balancing between the public benefit of the retirement age and its detrimental impact on some judges. Courts and tribunals should generally be reluctant to substitute their views of an appropriate balance between social policy goals with that of a democratically elected institution when the adverse effect of the impugned measure is modest and the policy supports an important social aim. Further, the fact that the government settled on the retirement age of 70 after consultations with the judiciary promotes the respect principle of the pluralist theory of age discrimination by ensuring the government sought and considered views from judges on the policy rather than unilaterally imposing the policy on the judiciary. The judicial retirement age, then, should be held to achieve an appropriate balance between competing interests at stake, and is reasonably necessary to achieving a legitimate aim, and therefore is objectively and reasonably justified under the Framework Directive.

Conclusion

This article has constructed a pluralist theory of age discrimination that can assist in distinguishing justified from unjustified age-differential treatment and therefore assist in identifying unlawful age discrimination under the Framework Directive. The theory consists of the following principles: efficiency (the requirement to maximise the gain in an important social good); equality of opportunity (the idea that inequality is wrong when it makes people worse off on grounds that someone cannot be held responsible for); social equality (the position that it is wrong when conditions produce hierarchies of status); respect (prohibiting expressions of insults or messages that certain people are worthy of lesser concern and respect) and autonomy (prohibiting actions that unfairly diminish a person's opportunities for autonomous agency).

I have argued that this pluralist theory of age discrimination reveals that the judicial retirement age in the UK is justified by advancing equality of opportunity and social equality and that this gain justifies the detriment to older judges in being subject to the retirement age. The judicial retirement age advances equality of opportunity and social equality because it increases the turnover of judges and therefore increases the number of vacancies for younger people and underrepresented groups. While the retirement age violates social equality and autonomy from the perspective of older judges, this detriment is limited by the fact that the vast majority of judges choose to retire before the retirement age of 70.

Notes

1. The default retirement age granted employers the opportunity to retire their employees at 65 years of age without having to demonstrate that the retirement age was objectively justified. The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 (SI 2011/1069) repealed the default mandatory retirement age.

2. Section 26 of the Judicial Pensions and Retirement Age 1993 is a 'requirement of an enactment' mandating that judges retire before 70 years of age and therefore falls under the section 191 and schedule 22 Equality Act 2010 exception to the prohibition of age distinctions.

3. If Blackham is correct that the judicial retirement age is unjustified, then judicial retirement ages will be unlawful even after the UK withdraws from the EU. This is because Article 3(1) of the Framework Directive, which holds that age distinctions relating to 'employment and working conditions' are unlawful unless objectively justified, will continue to take effect in the UK once the UK withdraws from the EU. Clause 4 of the European Union (Withdrawal) Bill 2017-19 will make any rights that are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972 to 'continue on and after exit day to be recognised and available in domestic law.' Provided a court or tribunal has recognised a right arising from a Directive prior to the UK's withdrawal from the EU, then Clause 4 holds that the right will be converted into domestic law. Since the ET in *White v Ministry of Justice* [2014] UKET/2201298/2013 recognised that the rights arising from Article 3(1) of the Framework Directive applies in the UK with the effect that the judicial retirement age is unlawful unless objectively justified, the right will be converted into domestic law under Clause 4. Clause 5(2) also provides that where there is a conflict between pre-exit domestic legislation and retained EU law, the supremacy of EU law will continue to apply. It follows that Article 3(1) of the Framework Directive will continue to apply over the domestic legislation with the effect that the judicial retirement age is unlawful unless objectively justified.

4. The theory of age discrimination outlined in this article is discussed in more detail in my PhD thesis (2017) *A Pluralist Theory of Age Discrimination*. PhD thesis. Queen Mary, University of London, UK.

5. The CJEU held in *R (The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* C-388/07 [2009] ECR I-1569 that the retirement ages engage the direct age discrimination

provisions of the Framework Directive and therefore are unlawful unless objectively justified.

6. In *Seldon v Clarkson, Wright and Jakes* [2012] UKSC 16, [2012] ICR 716, the Supreme Court held this is the appropriate test for proportionality assessments in age discrimination cases. The CJEU in *Fuchs and another v Land Hessen*, Joined Cases C-159/10 and C-160/10, [2011] 3 CMLR 47 held that it is essential that the proportionality test includes an assessment of the gravity of the effect upon the employees discriminated against and this being weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen.

7. This evidence was submitted to the ET in *White* and was used by the ET to justify the finding that the judicial retirement age is proportionate [16].

8. The Children and Young Persons Act 1933 s 23 and s 24.

9. Cupit (1998: 702) notes that ‘the alleged injustice of age discrimination presents a puzzle’ because the ‘[s]tandard argument against discrimination – the argument from equalizing benefits – seems not to apply.’

10. The compatibility of age discrimination with equality norms is discussed in detail by Daniels (1998) and McKerlie (1999). The argument has been used in *R (Carson and Reynolds) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2010] ECHR 338 to justify adopting a lower level of scrutiny for age distinctions than sex or race distinctions. Lord Walker justified this position on the grounds that age is different: ‘Every human being starts life as a tiny infant, and none of us can do anything to stop the passage of the years’ [80]. Younger people will eventually benefit from a provision which favours older employees and older employees will already have benefitted from a provision which favours younger people.

11. In a similar example demonstrating the limitation of the equality of opportunity principle, McKerlie (1992) described a marriage in which ‘circumstances dictate that first the husband and then the wife take turns in being dominant and subordinate.’ Despite the fact that the husband and wife each have an equal amount of dominance, this is still an unjustified form of inequality.

12. Elizabeth Anderson (1999) names this principle ‘democratic equality’. I use the name ‘social equality’ because it better captures that this version of equality relates not just to participation in democracy but also participation in society. For an argument that discrimination is wrong because it violates social equality, see Bagenstos (2013).

13. As David Miller (1999: 239) has stated:

[Social equality] does not require that people should be equal in power, prestige or wealth, nor, absurdly, that they should score the same on natural dimensions such as strength or intelligence. What matters is how such differences are regarded, and in particular whether they serve to construct a social hierarchy in which A can unequivocally be ranked as B's superior. Where there is social equality, people feel that each member of the community enjoys an equal standing with all the rest that overrides their unequal ratings along particular dimensions.

14. Gardner (1998) argued that much of what we consider wrong about paradigm cases of discrimination is in the actions of the discriminator.

15. See the South African case *Minister of Home Affairs v Fourie* [2005] ZACC 19. The South African Supreme Court held that no provision made for same-sex marriages amounted to unfair discrimination. In the majority, Judge Sachs adopted the respect account of discrimination to justify his ruling: 'To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference.'

16. The respect account has a number of subtly different accounts of discrimination. One version locates the wrong of discrimination in the thought process of the discriminator, for example, identifying the wrong of discrimination in the treatment of people 'with unwarranted contempt' (Cavanagh, 2002); another version locates the wrong in the loss of self-respect of the victim of discrimination, for example, Lawrence Blum (2002) highlights that racism can lead to feelings of inferiority; and another locates the wrong in the 'social meaning' of the act of discrimination, for example, Deborah Hellman (2004) has argued that discrimination conveys the message that the victims of discrimination have a diminished moral and social worth.

17. This pluralist approach to discrimination contrasts to unitary theories of discrimination that identify a single core principle that should explain all forms of discrimination. Unitary theories include Segall's (2012) argument that discrimination wrongs people when it places the discriminatee at a disadvantage because of a trait that a person should not be held responsible for. Discrimination law, on this account, has a justifying aim of promoting equality of opportunity. Gardner's (1998) account holds that discrimination is wrong when it has the effect of harming the capacity of people to live autonomous lives. The respect account holds that discrimination is wrong when it demeans people.

18. Requiring that age discrimination law take into account all five principles will clearly lead to debate about the priorities between these underlying concerns when they clash. This raises the issue of how courts approach this value pluralism and decide among the different principles. Incommensurability of values is a problem for applying discrimination law because the Equality Act 2010 and the Framework Directive has a proportionality test that requires 'balancing' conflicting values in order to determine the legality of any impugned treatment. If values are plural and incommensurable, then there is difficulty determining

which value should prevail in any given case (See Marino, 2013 for an account of the difficulty of building coherence in moral theory given the fact of value pluralism).

Choosing between competing incommensurable values raises difficult theoretical issues that may go beyond the remit of this article but for now it would be important to emphasise that the conclusion on proportionality should not be inferred from any particular belief, but from looking at the sum total of the principles that would be infringed by the impugned measure, related to the sum total of the principles that would be advanced. A judge must choose and this will mean that certain principles of my moral framework are promoted or vindicated while others are subordinated or sacrificed. Courts and tribunals must consider the most just outcome of a case, provide the reasons in support of it, and consider whether these reasons are more convincing than the reasons that support an alternative decision.

19. These judicial diversity statistics are available on the government website (20 July 2017) <<https://www.judiciary.gov.uk/wp-content/uploads/2017/07/judicial-diversity-statistics-2017-1.pdf>> accessed 26th February 2018.

20. Robert Alexy (2005) describes the proportionality assessment as follows: 'The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other.'

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